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IN THE

Supreme Court of the United States

October Term, 1970

SNYDER TANK CORPORATION,

Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD

Respondent

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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The attorneys for Snyder Tank Corporation petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

TABLE OF CONTENTS.

	PAGE
Index	ii
Opinions Below	1
Jurisdiction	1
Questions Presented	1
Statutes Invoked	2
The Board's Findings of Fact	2
The Board's Conclusion and Order	4
The Decision of the Court of Appeals	4
Reasons for Granting the Writ	4
Conclusion	17

INDEX.

PAGE

CASES

Aaron Brothers, 158 NLRB 1077 16

Garvey v. Freeman, 397 F. 2d 600 6

Hammon D. & Irving, Inc., 154 NLRB 84 16

N.L.R.B. v. Arkansas Grain Corp., 67 LRRM 2908 ..... 7, 8

N.L.R.B. Butler Shoe Co., 68 LRRM 2699 6

N.L.R.B. v. Gissel, 395 U.S. 575 ..... 12, 13, 14, 15

N.L.R.B. v. Howard Quarries Inc., 62 LRRM 2512 9

N.L.R.B. v. Nichols, 380 F. 2d 428 12

N.L.R.B. v. Pasner Inc., 432 F. 2d 826 10

N.L.R.B. v. Prettyman, 117 F. 2d 786, 790 5

N.L.R.B. v. United Parcel Service Inc., 317 F. 2d 912 6

Raytheus Co. v. N.L.R.B., 362 F. 2d 471 6

Schwarzenbach-Huber v. N.L.R.B., 488 F. 2d 236, cert., den. 396 U.S. 960 13

Struchsnes Construction Co., 165 NLRB 102 16

Textile Workers v. Darlington Mfg. Co., 380 U.S. 269 16

Union Carbide Corp. v. N.L.R.B., 310 F. 2d 849 7

United States Gypsum Company, 130 NLRB 901 10

Worzel v. Pub. Co., 171 NLRB 34 9

STATUTES

28 U.S.C. 1254(1) 1

29 U.S.C. 151, et seq. 2

U. S. Constitution, 5th Amendment 7, 10

OPINIONS BELOW.

The opinion of the Court of Appeals (App. pp. 1a) are not yet officially reported. The decision and order of the National Labor Relations Board is reported at 177 NLRB 94 (App. pp. 9a)

JURISDICTION.

The judgment of the Court of Appeals was entered on July 27, 1970 (App. pp. 1a). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

1. Did the Court of Appeals for the Second Circuit deny due process to the employer by upholding findings without factual support and err in upholding the finding that Douglas Gravelle was discriminately discharged since its decision stating "The company could cite no other instance in which a firing took place for a first offense" — is absolutely contrary to the evidence.

2. Has the Court of Appeals for the Second Circuit erroneously construed Sections 8(a)(1), (3) and (5) of the National Labor Relations Act so as to establish a rigid standard for employers, yet a lenient one for unions, and thus violate the concept of equal protection and due process and discriminate against employers.

3. Has the Court of Appeals for the Second Cir-

cuit misconstrued the holding of this Court in NLRB v. Gissel, 395 U.S. 575 and permitted misuse of authorization cards thus removing the sanctions as to fraud, coercion and misrepresentation established therein from unions, to the detriment and prejudice of employers.

4. Did the Court of Appeals for the Second Circuit err in upholding the finding that the union obtained valid authorization cards from a majority of the employees where evidence of fraud, coercion and misrepresentation, deliberately and clearly calculated to direct the signers to disregard and forget the language on the cards is clearly present in the record.

5. Did the Court of Appeals for the Second Circuit err in upholding the finding the proper remedy for the alleged Sections 8(a)(1) and (3) violations was an order to bargain because the acts complained of were not of sufficient gravity to warrant a bargaining order.

STATUTES INVOKED.

The relevant statutes invoked are the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U. S. C. 151, et seq) and the United States Constitution, 5th Amendment, set forth in the appendix at page 7a and page 9a, respectively.

THE BOARD'S FINDINGS OF FACT.

In September, 1966, the union, the International

Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, which intervened on the side of NLRB in the Court of Appeals, began an organization drive among petitioner's employees. The main means of attack was securing authorization cards from the employees. The wording on the cards was clear and it designated the union as the employee's representative for purposes of collective bargaining. While circulating the cards, the union held meetings to encourage the employees to sign cards.

On October 7, 1966, the Union wrote to the petitioner demanding recognition claiming it had valid authorization cards from over half the employees. At the same time, the Union filed a representative petition with the Board. The petitioner refused to bargain, stating that it doubted that the Union had been "voluntarily designated by an uncoerced majority." This good faith doubt was never challenged.

In that October and November, representation hearings were held. The Board found that the petitioners continued to express opposition to the Union. Another finding was that one employee, Douglas Gravelle, was discharged for his Union activity.

In January 19, 1967, an election was held. A majority of the employees did not vote for the union. The Union immediately filed unfair labor practice charges.

THE BOARD'S CONCLUSION AND ORDER.

The Board found that the petitioner violated Sections 8(a)(1) (3) and (5) of the National Labor Relations Act. The 8(a)(1) violation was based on the conclusion that the petitioner coerced the employees by interrogating the employees, by threatening to close the plant, by warning of more onerous working conditions, and by providing benefits if the Union were rejected. The Section 8(a)(3) violation was the discharge of Douglas Gravelle. The Section 8(a)(5) violation was refusing to recognize and bargain with the Union.

The Board ordered the petitioner to cease and desist from the unfair practices, to reinstate Gravelle, and to recognize and bargain with the Union.

THE DECISION OF THE COURT OF APPEALS.

The Court of Appeals sustained the Board's finding that the petitioner had engaged in restraint and coercion in violation of Section 8(a)(1) of the Act. The Court further found that the petitioner violated Section 8(a)(3) of the Act by discharging Gravelle. The Board also found a violation of Section 8(a)(5) of the Act.

REASONS FOR GRANTING THE WRIT.

While some of Appellant's claims of error are factual, they cry out for review as being without factual support.

1 The Trial Examiner found Douglas Gravelle had committed the act (throwing blocks into an aisle where other employees were wheeling carts loaded with metal tanks) for which the employer discharged him.[1] He also found it was a dangerous act warranting discipline.[2] He then substituted his mental processes for the actual testimony and found the employer discharged Gravelle for "horseplay".[3] Not even the testimony of Gravelle himself claimed this. His testimony was he accidentally dropped the blocks. The Company claimed he deliberately blocked the aisle. The Examiner on this conflicting evidence found he was committing horseplay.

An employer is entitled to a hearing of and the decision on the charges against him according to the fundamental principles that adhere in due process of law — the decision of the Board shall be governed by and based upon the evidence produced at the hearing.[4] There is no evidence to support a finding of "horseplay". Where an administrative order

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[1] "It may well be argued that the reason for this was that the offenses were minor and that the offense of Gravelle was major in impact." (Decision P. 27)

[2] "It cannot be denied that placing obstructions in the rather narrow aisles of the plant was a dangerous practice." (Decision of Trial Examiner P-27)

[3] "Suddenly for an infraction involving horseplay . . . this employee . . . was discharged without being given an opportunity to explain his action" (Decision P-27)

[4] NLRB v. Prettyman, 117 F. 2d 786, 790

is without factual support, as herein, it is without due process.[1]

When good cause for discharge appears, the burden on the Board is not simply to discover some evidence of improper motive, but to find an affirmative and persuasive reason why the employer rejected the good cause and chose a bad one. Mere existence of union animus is not enough.[2] The evidence fails to disclose facts to support the finding of discriminatory discharge. It is totally lacking in evidence to support the finding of horseplay. Such a finding is arbitrary and capricious and should be subject to review in depth.

In its decision on appeal, The Second Circuit stated "Similarly, substantial evidence supports the Board's conclusion that Gravelle was discharged, not for violation of work rules (since the company could cite no other instance in which a firing took place for a first offense) but because . . ." Considerable controversy developed at trial over the production of the company records as to firings as a result of a subpoena served during the trial. It was finally stated upon the record that in 1966, nine (9)

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[1]Garvey v. Freeman, 397 F. 2d 600, 610
[2]NLRB v. Butler Shoe Co., 68 LRRM 2699
NLRB v. United Parcel Service Inc., 317 F. 2d 912
Raytheon Co. v. NLRB, 362 F. 2d 471 and Sec. 10 (C) of the amended Act.

employees were discharged. Three (3) of them, including Gravelle, for a first offense.'

The decision upholding the discharge of Gravelle predicated as it is on the erroneous statement the company could cite no other instance of a firing for a first offense,' is a positive denial of due process to the employer.

2 A comparison of the standards applied in the instant case reveals a rigid standard was established for the employer in adjudging pre-election and organization drive statements while a carte blanche standard was applied to union solicitation statements which ignored the sanctions of fraud, coercion and misrepresentation.

The utterances of either side in an election campaign ought not to receive a narrow or strained construction.' Yet such a construction was applied to the

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'Testimony of Gerald Snyder

Q. And then you remember in that statement saying, "In each and every case, except that of Richter, Monk and Gravelle, these employees had been talked to innumerable times, had been warned innumerable times and every effort had been made to try to get them to straighten out."

A. If it's in a letter and I said it, that's the fact.

Q. Is it or is it not a fact? You say, "If it's in a letter."

A. It certainly is a fact.

Q. So except to Gravelle and two other people, you were lenient, speaking to them on numerous occasions trying to straighten them out; is that right?

'See Appendix for Court of Appeals Decision.

'Union Carbide Corp. v. NLRB, 310 F. 2d 849

employer even though no employee was restricted by the company from participating in the representation election." [The Examiner found the speech of the Company President on the day before the election" informed the employees the yearly wage increase would be held up. The Court of Appeals upheld this finding in reaching its decision". Yet the speech was in evidence as an exhibit and doesn't support the finding.]

By applying a different standard for the employer, it has been adjudged the company violated Section 8(a)(1) by coercive interrogation, promise of benefits, suspension of automatic benefits threats of plant closure, etc.

By construing the acts and statements of the union against a different standard, its acts and statements in procuring union authorization cards were allowed without regard to fraud, misrepresentation and coercion."

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[10]NLRB v. Arkansas Grain Corp., 67 LRRM 2908.

[11]Appendix — Respondents Exhibit 14.

[12]See Court of Appeals Decision in Appendix.

[13]a) The testimony of Matteucci:

Q. (By Trial Examiner) In other words, you are telling us that they told you that was for the purposes of attendance, is that correct, this card?

A. Yes, sir, that was the —

Q. To show you were there. A. Yes, Sir.

b) Testimony of D. Hinderliter:

Q. When was that? A. At one of the meetings. I signed — they told me it was just to verify that we was there.

(footnote continued on bottom of p. 9)

An employer does not violate Section 8(a)(1) by interrogating employees about union representation," by stating the employees best interests lay in the union's defeat, by stating employees would not be able to discuss gripes directly with management if a union came in." None of the Employer's statements or those of the working foremen were mis-

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c)The testimony of Donald Bellanca:
A. Well, he said you sign the card and it goes — well, they send them to the Company and the Company will turn around and it will come up to the NLRB. And it will come up for a vote, and whichever way the vote went is the way it would be.

d)The testimony of Terrance Crook:
Q. Did they say what the reason for the cards were. A. So that they could come in and take a vote.

e)The testimony of Frederick Schmidt:
Q. What did he tell you the card was for. A. He told us the card was about seeing about getting representation or vote from the U.A.W.

f)The testimony of Bernard Carney:
I think he said to get a vote to get enough votes in or get enough signatures so we could get a vote at the plant.

g)The testimony of Chad Troup:
To fill this card out was for getting a vote, so you could vote for the Union to come in.
Q. It was getting an election? A. For getting an election.

h)The testimony of Charles Hartman:
Q. Was anything said to you when you received the card? A. Well, they were talking about getting an election for that it was, the card was for, to get an election to try to get a Union down there.

"NLRB v. Howard Quarries Inc., 62 LRRM 2512

"Wornall v. Pub. Co., 171 NLRB 34

leading or inaccurate and neither implied nor expressed threats of reprisal or promise of benefit."

The Board in United States Gypsum Company[9] clearly stated "exaggerations, inaccuracies, partial truths, name calling and falsehoods, while not condoned, may be excused as legitimate campaign propaganda provided they are not so misleading as to prevent the exercise of a free choice by employees. No employee testified he was restricted in his right of self-organization."

Why should the Court of Appeals for the Second Circuit assist a union to deceive and dupe employees into signing authorization cards and deny to employers the right of legitimate statements accorded them by the Act."

This application of a double standard violates the employers right to equal protection of the law and denies them due process.

3 Card authorization cases have run the gamut through all the Circuits and in Gissel[10] this Court resolved the conflict among the circuits. However, it did establish guide lines for the application of

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[9]Section 8 (c) L.R.M.A.

[10]130 NLRB 901, 904

[11]NLRB v. Penner Inc., 432 F. 2d 826

[12]120 NLRB 901, 904

[13]395 U. S. 575

Gissel which the Second Circuit misapplied in the instant case. They are:

"— employers should be bound by the clear language of what they sign unless that language is deliberately and clearly cancelled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature".

"We cannot agree with the employers here that employees as a rule are too unsophisticated to be bound by what they sign unless expressly told that their act of signing represents something else."

There is no dispute herein that union adherents made representations in soliciting authorization cards. The query is did they violate the sanctions established by Gissel.

The Court of Appeals held the cards were clear on their face" and petitioner agrees. It decided the trial examiner and the Board resolved what conflicting testimony there was against the company but did not review it. Thus, we have the "too mechanical adoption of the Cumberland rule." The union adherents admittedly solicited cards on the representation they sought an election." In the Board's own words "a different situation is presented, of course, where union organizers solicit cards on the explicit or indirectly expressed representation they

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[8] See appendix for Court of Appeals Decision

[9] 144 NLRB 1268

[10] See footnote #13

will use such cards only for an election and subsequently use them for a different purpose." The testimony set forth in footnote 13 strengthens our contention. The employee Matteucci signed a card solicited in violation of the Gissel rulings[34] so did the employee, D. Hinderliter.[35] This is the type of fraud and misrepresentation rejected by Nichols[36] and disapproved by Gissel, " - - - unless expressly told their act of signing represents something else."

The representations to others [37] also violates the Gissel holding — "unless the language is deliberately and clearly calculated to direct the signer to disregard and forget the language above his signature."

4 In the instant case the Union claimed to represent a majority of the employees of Snyder Tank Corporation and submitted 81 authorization cards in support of its claim. Seventy-seven cards represented a majority. On trial one card was rejected for coercion. The Trial Examiner found the Union represented a Majority which was dissipated by acts of Respondent constituting Section 8(a)(1) and Section 8(a)(3) violations and ordered Respondent to

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[34]Q. (By Trial Examiner) In other words, you are telling us that they told you that was for the purposes of attendance, is that correct, this card?
A. Yes, sir, that was the —.
Q. To show you were there. A. Yes, Sir.

[35]Q. When was that? A. At one of the meetings. I signed — they told me it was just to verify that we was there.

[36]380 F 2d 428

[37]See footnote #13

bargain with the Union. On appeal to the Second Circuit Court of Appeals such finding was upheld. The appellate Court citing the recent decision by the Supreme Court in Gissel.

Snyder seeks further appeal and alleges a misapplication of the Gissel doctrine and other errors set forth hereafter.

A rejection of four (4) cards would defeat the alleged Union majority.

The following four (4) cards should have been rejected for the following reasons:

1. General Counsel's Exhibit 5g, the card of Samuel C. Bellavia, should be rejected because the card was not in the Union's possession when it claimed a majority on Oct. 7, 1966, and was not actually mailed until Oct. 15, 1966. Therefore it cannot be counted."[20]

2. General Counsel's Exhibit 5-bbbb, the card of one Larry Rollins, who was not produced as a witness, was admitted into evidence with an admitted alteration on the face of the card on the date. In the absence of explanation this card cannot be admitted into evidence under any rule of evidence known.

3. General Counsel's Exhibit 5 hh, the card of Delbert Max Hinderliter, who testified that he signed the card because he was told it was to show attend-

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[20]Schwarzenback-Huber v. NLRB, 488 F. 2d 236 (1969), cert. den. 396 U. S. 960

ance at a Union organization meeting should not be counted because it violates the proscription of Gissel ". . . unless expressly told his act of signing represents something else."

4. General Counsel's Exhibit 5 ss, the card of Joseph Matteucci, who testified that he signed the card because he was told it was to show attendance at a union organization meeting should not be counted because it too was obtained on the express representation that his act of signing represented something else.

The acceptance of the Matteucci and Hinderliter cards by the Trial Examiner and the refusal of the Second Circuit Court of Appeals to set them aside violates the Gissel decision; the acceptance of the cards of Bellavia and Rollins and the refusal of the Second Circuit Court of Appeals to void them violates the rules of evidence and denies the Company due process.

It is conceded the printed language of the card is clear and unambiguous. Respondent claims the actual testimony of the signers, Matteucci and Hinderliter, just as clear and unambiguously shows they were induced to sign the cards by fraud and misrepresentation and to ignore the printed language on the cards themselves thus bringing these two cards within the clear and unambiguous language of this court in Gissel. " . . . they were told their act of signing represented something else." They should have been rejected.

Gissel surely was not intended to give union sol-

icitors an open sesame to all sorts of fraud and misrepresentation but indeed was promulgated to prevent such fraud and misrepresentations in procuring authorization cards. A rose is a rose is a rose! A misrepresentation (calculated to have the signer ignore the printed language of the cards) is a misrepresentation is a misrepresentation. The Supreme Court in Gissel warned with the wisdom of its experience to examine the totality of the circumstances in these authorization card cases. The Trial Examiner and the appellate Court failed to heed this warning. The record is replete with the very fraud, coercion and misrepresentation that Gissel proscribes. Other cards were obtained in similar fashion. Even the Trial Examiner rejected one for coercion. Other cards which in the totality of the circumstances should have been rejected are:

General Counsel's Exhibits: a) 5s — Terrance Crook; b) 5cc — Ronald Guest; c) 5j — Donald Bellama; d) 5kkk — Frederick Schmidt; e) 5v — Bernard Carney; f) 5u — Sebastian Ciaceb; g) 5qq — John Szmalec; h) 5w — Chad Troup; i) 5 qqq — James Stuhr; j) 5kk — Charles Harman. Each of these cards was solicited, as the evidence clearly shows, with an understanding or representation deliberately induced by the Union, that there would be an election and to disregard and forget the language on the card. These along with the four cards previously described should be rejected. The union then would not have had a majority and the order to bargain should be set aside.

5. We question the propriety of a bargaining order for an alleged Section 8(e)(5) violation in the instant case for the following reasons:

a) the alleged Sections 8(a)(1) and 8(a)(3) violations are questionable, and at best, not serious enough to call for a bargaining order.[30]. b) the issue as to the validity of the union majority is under challenge.

The polling complained of herein was reasonable.[31]

There was no coercive interrogation, restraint or coercion of employees in their right of self-organization or voting.[31]

An employer is free to communicate to his employee any of his general or specific views about a particular union, so long as the communications do not contain a threat of reprisal or force or proviso of benefit.[32]

All of the Company's letters and speeches are in possession of the Board, are part of the record and reveal nothing serious enough to warrant an order to bargain.

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[30]Aaron Brothers 158 NLRB 1077, Hammon D & Irving Inc. 154 NLRB 84

[30]Strucksnes Construction Co. 165 NLRB 102

[31]The trial transcript contains no evidence of coercive interrogations, surveillance or restraint.

[32]Textile Workers v. Darlington Mfg. Co., 380 U. S. 269

CONCLUSION.

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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